No. 9197

In the United States Circuit Court of Appeals for the Ninth Circuit

J. W. MALONEY, COLLECTOR OF INTERNAL REVENUE, PORTLAND, OREGON, APPELLANT

v.

PORTLAND ASSOCIATES, INC., A CORPORATION, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

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CITATIONS

174932—39——1

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v.

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OPINION BELOW

The only previous opinion in this case is that of the District Court (R. 82), which is not reported.

JURISDICTION

This is an appeal from a judgment entered January 7, 1939, in favor of the taxpayer, appellee herein, for documentary stamp taxes assessed and paid in the aggregate amount of $7,282.48, with interest according to law (R. 108–109). The case is brought to this Court by notice of appeal filed April 6, 1939 (R. 204–205). The jurisdiction of this

Court is invoked under Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTIONS PRESENTED

1. Whether the stamp tax is payable in respect of the transfer to a voting trust of the rights of subscribers to receive the taxpayer's stock, such transfer having been made pursuant to arrangements to which they did not become parties until and as a result of their subscriptions.

2. Whether the stamp tax is payable in respect of the transfer of the right to receive voting-trust certificates representing the taxpayer's capital stock.

3. Whether the granting of options to purchase the taxpayer's capital stock is subject to the stamp tax.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra,* pp. 47–53.

STATEMENT

The facts as found by the court below (R. 89–105), although challenged in part hereinafter, are substantially as follows:

The taxpayer was a corporation organized and existing under the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon, and was voluntarily dissolved by resolution as of December 24, 1935. Since that time, it has been engaged in the process

of liquidation, the collection of its debts, and distribution of assets to its stockholders (R. 89).

At all times herein mentioned, the appellant was and now is the duly appointed, qualified, and acting Collector of Internal Revenue for the District of Oregon, having his office in the City of Portland, Multnomah County, Oregon (R. 90).

In October 1933 the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the taxpayer in the sum of $9,772.29, together with a penalty of 5 per centum in the amount of $488.61, together with interest thereon in the sum of $123.42, making a total assessment of $10,384.32, and thereafter, on December 11, 1933, appellant gave notice of the assessment to the taxpayer (R. 90).

In November 1933, the Commissioner of Internal Revenue made an assessment against the taxpayer on account of documentary stamp taxes in the sum of $205.60, together with a penalty of 5 per centum in the sum of $10.28, together with interest thereon in the sum of $2.60, making a total assessment of $218.48, together with an additional amount of interest in the sum of $41.29, making a total assessment of $259.77, and thereafter on December 11, 1933, appellant gave notice of the assessment to the taxpayer (R. 90).

Thereafter appellant caused notice of tax lien, on account of said assessment, to be filed in Multnomah County, Oregon, Big Horn County, Wyoming, Park County, Wyoming, and Yellowstone

County, Montana, the taxpayer having property situated in those counties in Wyoming and Montana (R. 91).

On March 5, 1935, the taxpayer paid to appellant, under protest, the sum of $1,989.10 as documentary stamp taxes previously assessed by the Commissioner of Internal Revenue; on or about November 2, 1935, the taxpayer paid to appellant, under protest, the sum of $10,474.30, being the balance claimed to be due and owing for documentary stamp taxes, and thereafter appellant caused the liens hereinbefore referred to to be satisfied and discharged of record (R. 91).

On November 15, 1935, the taxpayer filed with appellant, as Collector of Internal Revenue, a claim for refund of documentary stamp taxes, penalties, and interest previously paid in the sum of $10,298.18, of which $8,124.51 represented stamp taxes previously assessed and paid, and $2,173.67 thereof represented penalties and interest previously assessed and paid on the stamp taxes (R. 91).

Thereafter, on February 18, 1937, the Commissioner of Internal Revenue authorized a refund upon the claim for refund in the amount of $2,950.90, and rejected the taxpayer's claim for refund in the sum of $7,347.28. Thereafter, on or about the 2nd day of March 1937, appellant, in accordance with the ruling of the Commissioner upon the claim for refund, paid to the taxpayer, as a refund, the sum of $2,950.90, which represented a refund of documentary stamp taxes previously assessed

by the Commissioner in the sum of $2,300, which was paid by the taxpayer, and $650.90 represented the refund of penalties and interest previously assessed by the Commissioner and paid by the taxpayer (R. 92).

Prior to filing complaint herein, more than six months had elapsed since the date of the filing of the claim for refund, and the Commissioner of Internal Revenue, on February 18, 1937, notified the taxpayer by letter that the claim for refund had been rejected in the amount of $7,347.28 (R. 92).

On January 11, 1936, the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the taxpayer in the sum of $2,800, and thereafter, on January 22, 1936, the appellant made demand upon the taxpayer for the payment of the tax, together with penalties and interest thereon. Thereafter, on about the 8th day of February, subsequent notice and demand was given by appellant to the taxpayer and accordingly, on February 16, 1937, the taxpayer paid to appellant, under protest, the sum of $2,800, together with penalty and interest thereon in the sum of $175.81, or a total payment of $2,975.81 on account of said documentary stamp taxes (R. 92–93).

Thereafter, on February 17, 1937, the taxpayer filed with appellant its claim for refund in the sum of $2,975.81, including $2,800 documentary stamp taxes and $175.81 interest and penalties, and claimed a refund in the total amount of $2,975.81 (R. 93).

On September 18, 1937, the Commissioner of Internal Revenue rejected the taxpayer's claim for refund in the total amount of $2,975.81 (R. 93).

Prior to filing complaint herein, more than six months elapsed since the date of the filing of the claim for refund and the claim for refund has now been rejected in the total amount (R. 93–94).

On April 6, 1931, the taxpayer corporation was organized under the laws of the State of Oregon, with an authorized capital stock of 350,000 shares, having a par value of one dollar per share. On May 1, 1931, subscriptions were made to the capital stock, as shown by the minute records of said corporation, as follows (R. 94–96):

> C. R. Griffith does hereby subscribe for 349,996 shares of the par value of $1.00 per share, aggregating $349,996.00, of Portland Associates, Inc., an Oregon corporation, and agrees to pay for the same by transferring and assigning to the corporation that certain indenture of lease entered into under day of March 13th, 1931, by and between Montana and Wyoming Oil Company as lessor and C. R. Griffith, trustee, as lessee, covering the following described real property in the county of Big Horn and State of Wyoming:
>
> > The southwest (SW) quarter of the southeast (SE) quarter and the southeast (SE) quarter of the southwest (SW) quarter of section 28 in township 56 north of range 97 west of the sixth

principal meridian, containing 80 acres more or less.

and by transferring and delivering to the corporation that certain drilling contract dated April 16th, 1931, and secured by said trustee and his associates for this corporation from Paul Stock, of Cody, Wyoming, as driller.

The undersigned agrees that if this conditional subscription is accepted that he will donate 249,996 shares of said capital stock to the corporation for sale by it upon such terms and conditions as it may desire to sell the same or for use by it in any manner it desires, subject however to a voting trust agreement to be executed prior to the time said stock is delivered to this corporation. In the event this conditional subscription is accepted the undersigned directs that 60,000 shares of said stock be issued to Casing-Head Gas & Oil Co., that 15,000 shares of said stock be issued to M. F. Swift, that 25,000 shares of said stock be issued to C. R. Griffith, and that the remaining 249,996 shares be issued to the Secretary of Portland Associates, Inc., in trust for said corporation and such distribution as may from time to time be determined upon by the directors of said Portland Associates, Inc.

C. R. GRIFFITH.

We, the undersigned, do hereby subscribe for the number of shares of capital stock of Portland Associates, Inc., set after our

names and agree to pay therefor at the rate of $1.00 per share upon call of said subscription.

Name:	*Number of Shares*
Franklin T. Griffith	One
N. F. Swift	One
E. W. Battleson	One
S. M. Mears	One

The stockholders of the corporation accepted the offer of C. R. Griffith at a meeting of stockholders held May 1, 1931, and the directors of the corporation accepted the offer at a directors' meeting held May 1, 1931 (R. 96).

Certificate of stock No. 1 was issued to C. R. Griffith for 349,996 shares, and certificates Nos. 2, 3, 4, and 5 were issued to Franklin T. Griffith, S. M. Mears, E. W. Battleson, and M. F. Swift for one share each, and a documentary stamp tax was paid on the issuance of those certificates in the amount of $175.20. Thereafter, certificate No. 1 was endorsed and transferred by C. R. Griffith to Franklin T. Griffith, C. R. Griffith, and E. M. Steell, Trustees, transferring to the Trustees 349,995 shares, and certificate No. 6 for that number of shares was issued to the Trustees and a transfer tax in the amount of $70 was paid thereon. Certificate No. 8 was a void certificate used as a specimen only. Certificate No. 9 was issued to Paul Stock for one share, and Certificate No. 10 was issued to H. K. Senor for one share, being transfers from the Trustees, and a documentary stamp tax in the sum of four cents was paid on those transfers (R. 96–97).

A stamp tax was paid in the amount of three dollars on the authorization of C. R. Griffith to transfer 15,000 shares to M. F. Swift, and a documentary stamp tax of $12 was assessed and paid on the authorization to transfer 60,000 shares to Casing-Head Gas & Oil Company (R. 97).

There was no transfer of stock from C. R. Griffith to Portland Associates, Inc., or to the treasury of said corporation, or to anyone as an officer of the corporation (R. 97).

On October 1, 1931, the Articles of Incorporation of the taxpayer were amended, changing and increasing the authorized capital stock of the corporation from 350,000 shares of the par value of one dollar each, to 750,000 shares without par value, and there was issued one share of no par value for each share of one dollar par value stock then outstanding (R. 97).

At the time of the increase and change in the authorized capital stock of the taxpayer on October 1, 1931, the following resolution was adopted by the stockholders and directors (R. 135–136):

> Resolved that each and every share of said increase of capital stock so issued, sold, or disposed of shall be under and subject to all of the terms and conditions of that certain voting trust agreement entered into May 1, 1931, by and between the stockholders of Portland Associates, Inc., and Franklin T. Griffith, C. R. Griffith, and E. M. Steell, Trustees, under which agreement Henry F. Waechter has been substituted for E. M.

> Steell as such trustee. There shall be issued to each purchaser of any part of said increase of capital stock voting trust certificates under said voting trust agreement and there shall be issued to said Trustees for the benefit of such purchasers certificates of stock for a corresponding number of shares so sold, the same to be held by said Trustees under said voting trust agreement for the use and benefit of the purchasers of said units, the money paid for said units to go into the corporate treasury for the use and benefit of Portland Associates, Inc. (This paragraph is not included in the findings of fact of the court below.)

There was issued to Franklin T. Griffith, C. R. Griffith, and E. M. Steell, as Trustees, certificate No. 7, representing 505,000 shares of the capital stock, which included 349,995 shares transferred to the Trustees above named by stock certificate No. 6, dated September 22, 1931, and the additional 155,005 shares were issued in addition thereto under the authorization of the directors and stockholders of the corporation (R. 97–98).

An original issue documentary stamp tax was paid upon the 155,000 shares in the sum of $77.50. There was no transfer to the Trustees as shown by the records of the corporation other than the issuance of the above-mentioned certificate (R. 98).

The original subscription of C. R. Griffith for 349,996 shares of the capital stock of the corpora-

tion was conditioned upon the creation of a voting trust. A voting trust agreement was made and entered into as of May 1, 1933, between all of the stockholders of Portland Associates, Inc., and Franklin T. Griffith, C. R. Griffith, and E. M. Steell as voting trustees, and all of the stock of the corporation (except directors' qualifying shares) was held under the terms of the voting trust agreement. The Title and Trust Company, Portland, Oregon, acted as depositary under the agreement, and acted as agent of the voting trustees. The voting trustees sold voting trust certificates to various individuals and received the money therefor and paid the same into the treasury of the corporation, and caused to be issued to the purchasers of the certificates voting trust certificates. The taxpayer, Portland Associates, Inc., was not a party to the voting trust agreement and did not issue or cause to be issued any of the voting trust certificates. The voting trust agreement was made for the benefit of the stockholders of the corporation, and expressly provided that the entire outstanding capital stock of Portland Associates, except directors' qualifying shares, has been acquired and transferred to the Trustees upon the express understanding and agreement that all of the shares of stock will be assigned and delivered to the Trustees, the latter to hold and exercise the rights appertaining thereto under the terms of the agreement (R. 98–99).

No stock certificates have been issued by the taxpayer-corporation except stock certificates to the voting trustees and directors' qualifying shares of one share each to each of the directors of the corporation. Except as herein otherwise specifically found and declared, no person had any right to receive shares of stock in the taxpayer-corporation or certificates representing shares of stock issued by it except the voting trustees and the directors qualifying, one share each (R. 99).

Among other things, there was assessed, levied against, and collected from the taxpayer a documentary stamp tax in the sum of $3,100 as a transfer tax upon 155,000 shares of stock. The records of the corporation do not show any transfer of 155,000 shares of the capital stock upon which such tax can be assessed, levied, or collected (R. 100).

Among other things, there was assessed, levied against, and collected from the taxpayer the sum of $50, documentary stamp tax on a transfer of stock from C. R. Griffith to the treasury of the corporation. The records of the corporation do not show any transfer upon which such a tax can be assessel, levied, or collected, but since the corporation had the technical right to require that the mechanics provided in the original stock subscription be carried out—namely, donation to the treasury of the shares in question, then transfer by the corporation to the voting trustees rather than transfer direct by the subscriber to the voting trustees—the tax is justified, and it was therefore

legally assessed, levied, and collected in the amount of $50 upon such transfer (R. 100).

Among other things, there was assessed, levied against, and collected from the taxpayer a documentary stamp tax in the sum of $140 on purported transfers as of June 20, 1932, but the records of the corporation do not disclose any transfer of capital stock as of June 20, 1932, upon which the tax could be levied, assessed, or collected (R. 100–101).

Among other things, there has been assessed and levied against and collected from the taxpayer the sum of $120 upon a purported transfer subsequent to June 21, 1932,[1] and a refund has been made thereon in the sum of $60, leaving an assessment and collection on account thereof in the sum of $60. The records of the corporation do not disclose any such transfer of capital stock upon which a documentary stamp tax could be assessed, levied, or collected (R. 101).

There has been assessed, levied against, and collected from the corporation documentary stamp taxes on purported transfers of voting trust certificates, including a transfer tax on all of the voting trust certificates, but there was no transfer of certificates or of the right to receive by the taxpayer upon the voting trust certificates listed in the voting trust certificate books as original issues upon which a tax could be assessed, levied, or collected. The

[1] The effective date of Section 723 of the Revenue Act of 1932, *infra*.

voting trust certificates are as follows (R. 101–102):

> 1 to 38, inclusive; 41, 42, 46 to 52, inclusive; 54 to 66, inclusive; 68 to 118, inclusive; 127, 129, 157, 158, 204 to 208, inclusive; 222, 223, 233 to 236, inclusive; 244 to 247, inclusive; 76 to 84, inclusive; 290, 294 to 334, inclusive; 339 to 342, inclusive; 359, 360, 361, 374, 411 to 416, inclusive.

Documentary stamp tax on transfer was assessed and levied against and collected from the above corporation on certain voting-trust certificates. The records of the corporation show, however, that there was no transfer of the certificates, which are numbered as follows (R. 102):

> 228, 409, and 417.

The minute records of the corporation show that at an adjourned meeting of the Board of Directors held January 27, 1932, resolutions were adopted as follows (R. 102–104):

> Resolved, that this corporation purchase all of the capital stock of Big Horn Oil & Refining Company, a corporation duly incorporated under the laws of the State of Montana, in accordance with the proposition which has been submitted to this corporation by Mr. Paul Stock, representing the owners of all of the issues and outstanding stock of said Big Horn Oil & Refining Company, and in payment therefor issue

95,000 shares of the capital stock of this corporation as follows:

	Shares
To Jeff Tingle	2,000
E. J. Fleming	10,000
Mrs. E. E. Fleming	2,000
T. R. Graham	1,000
J. E. Simon	500
R. J. O'Malley	2,000
J. G. Everett	19,000
G. H. Downs	1,000
Paul Stock	57,500

BE IT FURTHER RESOLVED, that in consideration of Mr. Paul Stock's assuming and agreeing to pay or cancel the following indebtedness of said Big Horn Oil & Refining Company, as shown by the audit of the books of said company of December 31, 1931, to-wit:

Paul Stock	$3,929.45
E. J. Fleming	3,500.00
J. G. Everett, representing the claim of Associated Independent Dealers	1,331.72
J. G. Everett	1,000.00

this corporation hereby grants to said Paul Stock the option to purchase 15,000 shares of the capital stock of this corporation at $1.00 per share at any time prior to July 31, 1932.

RESOLVED that in consideration of his lending this corporation the sum of $10,000, Mr. E. W. Battleson be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share.

RESOLVED that in consideration of his lending this corporation the sum of $100,000, Mr.

> Franklin T. Griffith be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share.

No option agreements were made in writing between the corporation and the respective parties mentioned in the resolution. No money was ever paid by any of the persons mentioned in the resolutions for the purchase of any stock as mentioned in the purported options, and no stock was ever issued by the taxpayer to any of the persons on account of the purported options. None of the persons ever received any such stock and did not have the right to receive such stock unless and until they should pay the money therefor. There was no issuance or transfer of any stock in the corporation to any of the persons which was subject to documentary stamp tax either for issuance or transfer on account of the recitations in the minutes. The appellant has admitted by stipulation in the court below that the taxpayer is entitled to at least the sum of $700 on this item and the court finds that it is entitled to a total amount of $1,400 (R. 104).

There is competent evidence to show that voting trust certificates representing 35,000 shares of capital stock of the taxpayer were assigned, transferred, and delivered by Paul Stock to the corporation, and that the transfer thereof was taxable in the amount of $1,400 (R. 105).

Upon the basis of the foregoing facts, the court below held that there was no stamp tax due on a transfer of the right to receive stock to the Trustees who held for the benefit of the subscribing stockholders (R. 83); on the transfer of a right to receive voting trust certificates (R. 85–86); or on the issuance of the options embodied in the corporate resolutions (R. 86), as contended by the taxpayer. It upheld, however, the Government's contentions that liability for stamp taxes was incurred in connection with the transfer of the voting trust certificates (R. 87–88), and also on the direct transfer by stockholders to the voting trustees of the shares which were intended to have been donated to the corporation and by it transferred to the trustees (R. 83–84). The District Court thereupon entered judgment accordingly (R. 108–109). From the judgment so entered, the appellant took this appeal (R. 204–205).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred (R. 205–206, 212–215):

1. In that Findings of Fact Nos. 16, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, and 30, made and filed by the court below (R. 96–104), and each of them, are erroneous, are not supported by, and are contrary to, the evidence produced at the trial of the above-entitled cause.

2. In failing to enter the Findings of Fact (R. 70–80) requested by the defendant, appellant herein.

3. In that Conclusions of Law Nos. 1, 3, 4, 5, 6, 7, and 9, made and filed by the court below (R. 105–107), and each of them, are erroneous, are not supported by, and are contrary to, the evidence and Findings of Fact made and filed by the District Court.

4. In refusing to find and enter the Conclusions of Law (R. 80–82) requested by defendant, appellant herein.

5. In finding that any of the taxes involved herein were unlawfully or erroneously assessed and collected, and in refusing to grant defendant's (appellant's) motion for judgment (R. 49–51).

SUMMARY OF ARGUMENT

1. The shares involved in this issue were part of the *increase* in the taxpayer's authorized capital stock and represented original subscriptions for which the first and only certificate, No. 7, was issued from the taxpayer to the voting trust. The issuance of that certificate to the trust amounted, contrary to the findings and conclusion of the court below, to a transfer by the subscribers, who paid for the stock, of their rights to receive the shares of the voting trust, which is taxable under the statute. This is shown by the great weight of the evidence. The adverse findings and conclusions of the court below should therefore be set aside and correct conclusions drawn by this Court to the effect that the subscribers actually had the right to receive the shares, and consequently the transfer

thereof was taxable. The statute and the pertinent regulations provide for taxation of such transactions.

The generating source of the right to receive the newly issued shares of the taxpayer was the payment to it, through the trust, of the consideration therefor by the subscribers who received the voting trust certificates, not by the voting trustees. The new shares could not lawfully be issued to others without the subscribers' authority. The grant of that authority, clearly shown by the evidence, is a transfer of "the right to receive" within the meaning of the statute. The voting trustees are not shown to have been entitled to receive and hold the taxpayer's stock without a grant of the right to do so by the purchasers, the subscribers, or owners of the voting trust certificates. Since the voting trustees received and held greater interests and powers in the stock involved than is possessed by nominees, upon admitted transfers to them, we think the effective disposition of the rights of the purchasers, the subscribers, or owners of the voting trust certificates, to subscribe for or to receive the shares or certificates of the stock purchased, unquestionably constituted taxable transfers, just as if the several or separate relationships of the parties had been established at different times and by separate instruments.

2. The court below erred in holding that the transfer of the right to receive the voting trust certificates representing the taxpayer's stock is not

taxable. The Treasury Department has consistently held that transfers of voting trust certificates and transfers of the right to receive such certificates are taxable since they carry all the rights of the stock, except the voting power, including the right to receive the stock upon dissolution of the voting trust, as herein. We think the Treasury Department's position therein is sound and has been justified under the statutes as broadly and liberally interpreted by judicial authority. Under the rules thus laid down, the subject of the tax embraces the right to receive any certificate or interest in the taxpayer's property and the transfers of rights to subscribe for or receive shares or certificates, whether made upon the books of the taxpayer or by any other evidence.

There is ample evidence herein to show such rights to receive voting trust certificates representing the taxpayer's stock. Therefore, the findings of the court below to the contrary should be set aside, and the rights to receive the voting trust certificates representing the taxpayer's capital stock held taxable.

3. The court below erred, we submit, in holding that an option does not become an "agreement to sell" until the offer is accepted by the exercise of the option, and that Congress would have used the word "option" in the statute if it had intended to tax the grant of options. It is settled, however, that an "agreement to sell," as provided in the statute, may be referred to as either a "call" or an

"option," and that, in either event, it is taxable, whether or not exercised, since each constitutes an absolute promise to sell.

The taxpayer became absolutely obligated to sell the shares of stock referred to in the directors' resolution herein, and since the options were given for sufficient consideration they were taxable as "agreements to sell," as provided by the statute and regulations.

ARGUMENT

I

The transfer to the voting trust of the rights of the subscribers to receive the taxpayer's stock, made pursuant to the arrangements to which they did not become parties until and as a result of their subscriptions, is subject to the stamp tax within the meaning of schedule A–3, title VIII, Revenue Act of 1926, as amended

A résumé of the somewhat complicated facts pertaining to this issue may be helpful. After the increase of the taxpayer's authorized capital stock from 350,000 to 750,000 shares on October 1, 1931 (R. 97, 119), and pursuant to the resolutions adopted on the same date (R. 135–136), 155,000 shares of the new no par value stock were subscribed for by various individuals (R. 160). The subscriptions were paid to the voting trustees who, in turn, paid the money therefor to the taxpayer (R. 135, 159–160, 171). Thereafter, on April 5, 1932, the taxpayer issued its stock certificate No. 7 for 505,000 shares of its new no par value stock to Franklin T. Griffith et al., Trustees (R. 153, 157).

The 505,000 shares included the 349,995 shares previously transferred to the trustees by stock certificate No. 6, issued September 22, 1931 (stock certificate No. 6 having been surrendered to the taxpayer for cancellation), and also the above-mentioned 155,000 shares subscribed for during the previous several months (R. 125–127, 144–145, 172–173), for which the subscribers received voting trust certificates (R. 136–137).

The Commissioner of Internal Revenue taxed this transaction as a transfer by the various subscribers of their right to receive 155,000 shares of the taxpayer's new stock, the tax assessed and paid thereon having been two cents per share, or $3,100 (R. 100, 171).

The court below allowed recovery, holding that no stamp tax was due on the transaction involving the issuance of the stock to the trustees to hold for the benefit of the subscribing stockholders. The reason assigned was that the stockholders never had the right to receive such shares, and consequently no transfer of the rights to receive them occurred (Par. 1, R. 83; Finding XXIV, R. 100). In so doing, the court relied on the decision of this Court in *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72, and attempted to distinguish *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, and *United States* v. *Automatic Washer Co.,* decided *sub nom. Founders General Co.* v. *Hoey,* 300 U. S. 268, 273–274, "and other cases" (R. 83) on the ground that, in such cases, this right existed.

We submit that the basis of the decision of the court below is untenable; that the finding and conclusion that the transfer of the 155,000 shares was not one upon which a stamp tax attached (R. 100, 105) is contrary to the evidence; that the court below erred in holding that there was no transfer of rights to receive the stock because the subscribers never had any rights to receive it (R. 83); and that therefore this Court should set aside the adverse finding and correctly hold that the transfer by the subscribers to the taxpayer's stock of their rights to receive the 155,000 shares is taxable within the meaning of the pertinent statute and regulations.

The shares involved in this issue were part of the *increase* effected October 1, 1931, in the taxpayer's authorized capital stock and represented original subscriptions by the various subscribers for which the first and only certificate issued was stock certificate No. 7, issued April 5, 1932, from the taxpayer to the voting trust. It is apparent, therefore, that the issuance of stock certificate No. 7 to the voting trust amounted, contrary to the findings and conclusion of the court below, to a transfer by the subscribers, who paid for the stock, of their rights to receive the shares of the voting trust, which is taxable under the act. This is shown by the great weight of the evidence.

The evidence shows that (R. 137, 161)—

> * * * when they bought the stock or the voting trust certificates they were buying

> voting trust certificates, *which would entitle them to a certificate of stock* for the same same number of shares at the expiration of the voting trust. [Italics supplied.]

That the voting trustees "never subscribed to stock" (R. 160); that "the only certificates that were held by those purchasing [an] interest in the corporation were voting certificates" (R. 137); and "upon the expiration of the voting trust * * * those purchasing [voting trust certificates] would have been entitled to a share of stock in the corporation" (R. 138). The corporate records showed that (R. 136, 146–147)—

> There shall be issued to each *purchaser of any part of said increase of capital stock* voting trust certificates under said voting trust agreement and there shall be issued to said Trustees for the benefit of such purchasers certificates of stock for a corresponding number of shares so sold, the same to be held by said Trustees under said voting trust agreement for the use and benefit of the purchasers of said units. * * * [Italics supplied.]

and it was testified that the taxpayer corporation "authorized the issuing of them" [that is, the voting-trust certificates] (R. 147). This shows that the subscriber was the "purchaser * * * of the capital stock" who merely yielded his right to receive it for a voting-trust certificate authorized to be issued by the taxpayer corporation. The evi-

dence also shows that on "the subscription agreement involving the original 350,000 shares, it was there stated that the purchaser of the shares would purchase them pursuant to the voting-trust agreement" (R. 183), and that while no *certificates* of stock were issued to them, still "shares were bought" (R. 185) by the subscribing stockholders who paid the taxpayer for them through the voting trustees (R. 135, 159–160, 171).

It cannot be said, therefore, that this evidence supports the findings of the court below that the subscribing stockholders never had the right to receive the shares. It shows exactly the contrary. They paid for the shares and elected to have the voting trust hold them, receiving, however, trust certificates, share for share, representing their "purchasing [and] interest in the corporation" (R. 137). Clearly therefore, they had the right to receive the shares, merely foregoing exercising the right in order to permit the carrying out of the purposes of the voting trust arrangement. This is exemplified in the colloquy during the cross examination of internal revenue agent Canneddy (R. 194–197). The adverse findings and conclusions of the court below should therefore be set aside, as contrary to the great weight of the evidence,[2] and correct conclusions drawn by this Court

[2] Findings of fact which are clearly erroneous may be set aside. Rule 52 (a), Rules of Civil Procedure. In the Proceedings of the Institute of Federal Rules, 1938, pub-

to the effect that the subscribers actually had the right to receive the shares and consequently the transfer thereof was taxable.

Section 800, Title VIII, of the Revenue Act of 1926 expressly provides:

> * * * there shall be levied, collected, and paid, for and in respect of the several bonds, * * * certificates of stock and indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, * * *, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such Schedule.

While practically identical statutes appearing in prior revenue acts were considered in earlier cases, the above section was first construed in *Raybestos-*

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lished by the American Bar Association, it is stated (p. 383), as follows:

"But of course Rule 52 (a) specifies the test that will be applied in appellate courts in passing on the question of whether findings are sustained by the evidence, and the test is whether they are clearly erroneous or not; in other words, the test is whether the weight of the evidence is clearly against the findings."

Manhattan Co. v. *United States,* 296 U. S. 60, wherein the Court expressly stated (p. 61):

> Section 800 imposes liability for the tax upon the transferor, the transferee, and the corporation whose stock is transferred.

The statute, in so far as here applicable, discloses an undoubted intent to tax deliveries of, or transfers of, either (1) legal title to shares or certificates of stock, or (2) rights to receive such shares or certificates. Literally read, the statute taxes such a transfer or delivery, whether effected by voluntary act, involuntary act, or by operation of law, for it makes no exemptions. *Welch* v. *Kerckhoff,* 84 F. (2d) 295 (C. C. A. 9th).

Article 34 of Treasury Regulations 71 expressly provides that the following transactions, among others, are subject to the tax: All sales, or transfers, or changes of ownership, of shares or certificates of stock, or of profits, or of interest in property, or accumulations, in any corporation, or of the interest of a subscriber for stock, or of the right to subscribe for stock, *or of the right to receive stock,* or of the right to receive a stock dividend, whether or not represented by certificates, regardless of how evidenced and whether or not the holders thereof are entitled in any manner to the benefit of such stock. This is a reasonable regulation and should be given effect.

Thus it is seen that the transactions involved herein constituted taxable deliveries or transfers by the purchasers and subscribers, or holders of voting trust certificates, to the voting trustees within the meaning of the statute and Regulations 71, *infra,* promulgated thereunder.

The generating source of the right to receive the newly issued shares of the taxpayer was the furnishing and payment to it, through the trust, of the consideration therefor by the subscribers or persons who received the voting trust certificates or beneficial interests, not by the voting trustees. The new shares could not lawfully be issued to any others than such persons without their authority. *Raybestos-Manhattan Co.* v. *United States, supra.* The legality of the issuance of the stock in the names of the trustees rests on the fact that the subscribers or persons furnishing the consideration, in some manner or by some form of procedure, such as an agreement, causing the stock purchased to be issued to the voting trustees, or by accepting voting trust certificates and becoming parties to the voting trust agreement, or otherwise so directing, authorized such issuance and granted to their trustees the right to receive the stock entered in their names. *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275; *Standard Oil Co. of California* v. *United States,* 90 F. (2d) 571, 573 (C. C. A. 9th). The grant of that authority is a transfer of "the right to receive" within the meaning of the Act; and we are not to look beyond the Act for further criteria of taxa-

bility. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Founders General Co.* v. *Hoey, supra; Standard Oil Co. of California* v. *United States, supra.* The grant of that authority is clearly demonstrated by the evidence, as heretofore shown. Moreover, since the evidence discloses that the trustees held title to and the certificates of stock involved, with the right to exercise certain powers incidental thereto, as trustees for the subscribers or beneficial owners, who are described as owners of voting trust certificates and collectively called stockholders under the voting trust agreement, without being liable upon said stock as owners thereof, it can hardly be fairly said that the voting trustees herein were the subscribers and are the beneficial owners, in fact, of the taxpayer's stock, or were in their own right entitled to receive and hold the stock, without a grant of the right so to do by the purchasers, the actual subscribers, who were the beneficial owners of the shares here involved.

Since the voting trustees herein received and held greater interests in and possessed greater powers with respect to the shares of stock involved than is possessed by nominees upon admitted transfers to them, we think the effective disposition made of the rights of the purchasers, subscribers, or owners of voting trust certificates to receive legal title to, or to receive the shares or certificates of the stock purchased, unquestionably constitutes taxable transfers, the same as if the several or separate relationships of the parties (*New Colonial Co.* v. *Helvering,*

292 U. S. 435) had been established at different times and by separate instruments. *Raybestos-Manhattan Co.* v. *United States, supra; Founders General Co.* v. *Hoey, supra; Ladner* v. *Pennroad Corp., infra; Standard Oil Co. of California* v. *United States, supra; Welch* v. *Kerkhoff, infra; In re Consolidated Automatic Merchandising Corp.,* 90 F. (2d) 598 (C. C. A. 2d); *United States* v. *Vortex Cup Co.,* 84 F. (2d) 925 (C. C. A. 7th); *United States* v. *Brown Fence & Wire Co.,* 9 F. Supp. 1008 (N. D. Ohio), affirmed, 88 F. (2d) 1005 (C. C. A. 6th); *Orrington Co.* v. *United States* (N. D. Ill.), decided November 17, 1937, not reported.

We submit this case is concluded by the decisions of the Supreme Court in *Raybestos-Manhattan Co.* v. *United States, supra,* and *Founders General Co.* v. *Hoey, supra.*

In the *Raybestos-Manhattan* case, two corporations, pursuant to a consolidation agreement, conveyed their property to a new corporation in return for shares of its capital stock, issued not to the two corporations but directly to their stockholders in proportion to their holdings in those corporations. The Supreme Court held that the transaction was subject to a stamp tax under Section 800 of the Revenue Act of 1926, not only on the original issue of the shares but also on the transfers necessarily involved whereby the rights to receive the shares, inherent in the two corporations by operation of law, were transferred by the agreement to the stockholders.

We think the decision in that case is at variance, in principle, with the rules laid down by this Court in *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72, just as the Circuit Court of Appeals for the First Circuit thought, in deciding *Baker* v. *United States, supra,* after the decisions in the *Raybestos-Manhattan* and *Founders General Co.* cases had been handed down, upon reconsideration of its previous decision in *White* v. *Consolidated Equities, Inc., supra.* In the present case, as in the *Raybestos-Manhattan* case, those subscribers who paid for the taxpayer's capital stock were entitled to receive the stock. When the subscribers in the present case agreed, by purchasing subject to the corporate resolution (R. 135–136) and in accordance with the voting trust agreement, to the issuance to the trustees of stock certificate No. 7, representing their shares as well as other shares, they thereby transferred their right to receive the stock just as the two former corporations in the *Raybestos-Manhattan* case, by the consolidation agreement, transferred their right to receive the new corporation's stock to their stockholders.

In *Founders General Co.* v. *Hoey, supra,* a new corporation took over the assets of an old one and agreed to issue its shares to the old stockholders. In pursuance of an irrevocable agreement and power of attorney previously executed by the stockholders, however, portions of their new allotment, pro rata, were issued directly to their attorney for

purposes of sale. The Supreme Court held that there was a taxable transfer from the stockholders to the attorney of the "right to receive" shares under Section 800, Schedule A–3, Revenue Act of 1926.

Ladner v. *Pennroad Corp.,* 97 F. (2d) 10 (C. C. A. 3d), certiorari denied, 300 U. S. 618, involved exactly the same situation as herein. There the voting trustees agreed to issue voting-trust certificates to subscribers for the taxpayer corporation's stock upon receipt of the stock certificates from the corporation. This procedure was followed, with the result that the corporation received the subscription payments, the trustees received the stock, and the subscribers received the voting-trust certificates. In holding that the transaction represented a transfer of the right to receive stock, the court pointed out that under ordinary procedure, a voting trust is created by the stockholders depositing stock issued to them with the trustees, which automatically incurs the stamp tax. The short-cut procedure whereby the stock was issued directly to the trustees did not, in the opinion of the court, obviate the obligation to pay the transfer tax, as the facts were held to establish that the right to receive the shares was transferred from the subscribers to the trustees. The court stated (p. 11):

> It will be noted that the subscribers sent checks for the stock to the appellee; the appellee issued stock to the trustees, who then

> issued trust certificates to the subscribers. The question is whether this transaction is subject to documentary tax. A voting trust is ordinarily created by stock being issued to stockholders who in turn deposit it with the trustees. Such a transaction automatically incurs the stamp tax. The fact that the stock in this case was delivered directly to the trustees does not, in our opinion, obviate the obligation to pay the stamp tax. A transfer of the right to receive stock is taxable within the meaning of the Revenue Act of 1926, Title 8, Sec. 800, Schedule A–3, 26 U. S. C. A., Sec. 902 and note, and Articles 31 and 34 of Treasury Regulations 71.

The only distinction, upon the facts, between that and the instant cases is that there the subscription price was paid directly to the corporation, whereas herein it was paid to the trustees who turned it over to the taxpayer corporation. We submit that this difference is immaterial.

The voting trust, organized to hold the taxpayer's stock and thus maintain control of the company, offered voting-trust certificates for sale (R. 114). The subscription price of these certificates was turned over by the trust to the taxpayer for stock against which voting-trust certificates were issued to the subscribers (R. 135). *White* v. *Consolidated Equities,* 78 F. (2d) 435 (C. C. A. 1st), holding that there is no documentary stamp tax on a transaction involving a like transfer, under circumstances not unlike those herein, was, in effect, over-

ruled by the Supreme Court in the later cases of *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, and *Founders General Co.* v. *Hoey,* 300 U. S. 268. The Circuit Court of Appeals for the First Circuit (which had decided the *White* case) took cognizance thereof in *United States* v. *Baker* (C. C. A. 1st), decided March 25, 1939, not yet reported but found in 1939 Prentice Hall, Vol. 1, Par. 5.319, an analogous case, wherein it stated:

> As the cases cited above [that is, *Raybestos-Manhattan Co.* v. *United States, Founders General Co.* v. *Hoey,* and *Ladner* v. *Pennroad Corp.,* 97 F. (2d) 10 (C. C. A. 3d), certiorari denied, 305 U. S. 618] were decided since the case of *White* v. *Consolidated Equities, Inc.,* 78 F. (2d) 435, we think they should be followed.[3]

In that case, the investment trust issued certain of its shares to a voting trust and in return for such shares, the voting trust delivered an equal number of voting trust certificates. The voting trust certificates were later sold to the public, the transaction being accomplished by the investment trust's surrendering the certificates it held and directing the transfer agent to issue and deliver new voting trust certificates for an equivalent number in the name of the purchaser. The court agreed with the Government's contention that the transaction was,

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[3] The Circuit Court of Appeals, however, attempted to distinguish the *White* case, but we think the facts and issues in both of those cases, as well as in the instant case, are substantially similar.

in substance, a transfer of the voting trust certificates into the hands of the public, and held that the sale of such certificates was subject to the stock transfer tax since the beneficial and equitable interests in the investment trust stock were thereby transferred to and received by the purchasers.

In deciding the present case, the court below cited this Court's decision in *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72, which is fairly analogous although there are some factual differences. In that case, the trust had been created in 1917 under an agreement with the subscribing stockholders whereby stock of the corporation was to be held in trust for their benefit. The tax on the original shares then delivered or subsequent shares delivered to the trustees up to 1926 was not at issue. The first cause of action related to the imposition of an additional transfer tax on shares issued directly to the trustees during 1927 and 1928. Of such stock so issued, this Court held the delivery of shares constituting a stock dividend did not incur additional liability based on the transfer of the right of the stockholders to such stock. As to a further lot of shares issued pursuant to sales by the corporation and direct issuance to the trustees, the Court likewise held no additional transfer tax, based on the right to receive such shares, was due. The Court pointed out that the beneficiaries purchased certificates of beneficial interest in such shares which amounted to nothing more than the right to acquire a greater

equity to be received on termination of the trust, and not the right to acquire legal title to the shares. An additional group of shares issued to the trustees to be held as a reserve to meet the requirements of an employee's compensation plan was likewise held not to involve any transferred rights to receive stock, such shares being held for the benefit of the issuing corporation. Of the total additional shares delivered to the trustees, only the stock which incurred the additional transfer tax represented an exchange of stock with another bank. This transaction was held taxable as being in the nature of a true nominee arrangement.

The result reached in that case, we believe, is contrary to the broad principles laid down in the *Raybestos-Manhattan* and *Founders General* cases, *supra,* because the subscribers there actually furnished the consideration and were thereby entitled in the first instance to receive the stock only subject to the voting trust agreement, and the voting trust agreement recognized that they had a right to the stock since they actually did furnish the consideration. In any event, that case, we think, is distinguishable from the present case. There the decision seems to have turned primarily on the fact that the warrants entitled the subscribers to subscribe for and receive only voting trust certificates. In the instant case, however, the resolution itself (R. 135–136) shows clearly that the subscribers were actually subscribing to the stock itself, merely subject to an arrangement to which they agreed

that the stock should be placed in the hands of voting trustees who were to issue voting trust certificates representing the subscribers' beneficial interests in the stock.

In view of the foregoing, we submit that the adverse findings and conclusions of the court below should be set aside, as contrary to the great weight of the evidence, and correct conclusions drawn by this Court to the end that the transfer by the subscribers to the taxpayer's stock of their rights to receive the 155,000 shares be held taxable within the meaning of the pertinent statute and regulations in harmony with controlling authority cited heretofore.

II

The stamp tax is payable in respect of the right to receive the voting trust certificates representing the taxpayer's capital stock

Prior to June 21, 1932 (the effective date of Section 723 of the Revenue Act of 1932, increasing the rate of tax to 4 cents per share), voting trust certificates for 10,000 shares of the taxpayer's treasury stock (which were included in and represented by stock certificate No. 7 for 505,000 shares issued to the trustees of the voting trust on April 5, 1932), and also voting trust certificates for 120,445 shares of the taxpayer's new stock were issued to various individuals. These individuals had not deposited any of the shares represented by the voting trust certificates with the trustees of the voting trust. The 10,000 shares of treasury stock were part of

the 249,996 shares donated back to the taxpayer on May 1, 1931, by C. R. Griffith, when he surrendered stock certificate No. 1 for cancellation, and were deposited by the taxpayer with the trustees on September 22, 1931, on which date stock certificate No. 6, which included these shares, was issued by the taxpayer to the trustees for 349,996 shares. The 120,445 other (new) shares—not treasury shares—likewise were shares which had not been deposited with the trustees by the persons to whom the voting trust certificates therefor had been issued.

The Commissioner of Internal Revenue taxed these transactions, as transfers of the right to receive voting trust certificates representing the taxpayer's stock, at the rate of two cents per share, the tax thereon amounting in the aggregate to $2,608.91.

Subsequent to June 21, 1932, voting trust certificates for 1,640 shares were also issued to persons who had not deposited the shares represented by those certificates with the trustees of the voting trust. The Commissioner taxed these transactions, as transfers to the recipients of the voting trust certificates of the right to receive such certificates representing the taxpayer's stock, at the rate of four cents per share, the tax amounting to $65.60.

The court below held while the statute levied a tax in respect of the transfer of voting trust certificates, it did not levy one in respect of the right to receive such certificates, and therefore, on the au-

thority of *Corporation of America* v. *McLaughlin, supra,* allowed recovery of the taxes ($2,674.51) paid on these transfers (R. 85–86).

We submit that the decision of the court below is in error in holding the transfer of the right to receive the voting trust certificates representing the taxpayer's stock is not taxable.

The Treasury Department has consistently held that transfers of voting trust certificates and transfers of the right to receive such certificates are taxable inasmuch as they carry all the rights of the stock, except the voting power, including the right to receive the stock upon dissolution of the voting trust, as herein. Article 34, Regulations 71, *infra;* Article 12 (as amended, July 24, 1924, by T. D. 3620, III–1 Cum. Bull. 396, providing that the sale or transfer of certificates or shares representing the beneficial interests in an association, or in an operating business trust, is subject to tax) and Article 33 (1) (f) of Regulations 40; G. C. M. 11693 XII–1 Cum. Bull. 430. We think the Treasury Department's position therein is sound and has been justified under the statute as broadly and liberally interpreted by the Supreme Court in the *Raybestos-Manhattan* and *Founders General Co.* cases, *supra.*

In the *Raybestos-Manhattan Co.* case, the Supreme Court stated (pp. 62–63):

> The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a share-

> holder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. See *Provost* v. *United States,* 269 U. S. 443, 458, 459, 46 S. Ct. 152, L. Ed. 352. While the statute speaks of transfers, it does not require that the transfers shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another. * * * It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation.
>
> The subject of the tax is not alone the transfer of ownership in shares of stock. It embraces transfers of rights to subscribe for or receive shares of certificates whether made upon the books of the corporation "or by any paper, agreement, or memorandum or other evidence of transfer * * *."

Under the rules laid down by that decision, the subject of the tax embraces the right to receive any certificate or interest in the taxpayer's property and the transfer of rights to subscribe for or receive shares or certificates, whether made upon the books of the taxpayer corporation or by any other evidence of the transfer. It is immaterial, therefore, we submit, whether or not the issues and transfers are shown herein by the taxpayer's records.

While the question before the court in the *Raybestos* case was not the taxability of the transfer of

the right to receive voting trust certificates, the above-quoted language of the court, clearly not *dicta,* marks out the extensive limitations of the statute sufficiently to warrant the imposition of the tax on the transfers of the right to receive the voting trust certificates herein. Cf. *Standard Oil Co. of California* v. *United States,* 90 F. (2d) 571 (C. C. A. 9th), wherein this Court, on the authority of the *Raybestos-Manhattan* and *Founders General Co.* cases, held taxable the transfer of the right to receive the stock when the issuance thereof was direct to the stockholders and not to the corporation entitled to receive it.

It is therefore submitted that the stamp tax is payable in respect of the transfer of the right to receive the voting trust certificates representing the taxpayer's stock.

III

The granting of the options to purchase the taxpayer's stock is subject to the stamp tax

At an adjourned meeting held January 27, 1932 (R. 181), the taxpayer's board of directors passed a resolution giving options expiring July 31, 1932, to Paul Stock, E. W. Battleson, and Franklin T. Griffith to purchase 35,000 shares of its capital stock in consideration for their having made large cash loans to the taxpayer (R. 102–104, 119–121, 128–132, 139–140, 141–142). The options thus granted were not exercised prior to July 31, 1932, the expiration date thereof (R. 104, 119–120, 138, 199–200), but the option holders "unquestion-

ably * * * had the right to do it" (R. 139). The Commissioner assessed against the taxpayer $1,400 stamp taxes upon the theory that these options constituted "agreements to sell" stock within the meaning of Section 800, Schedule A–3 of the 1926 Act, *infra*. The tax was assessed thereon at the rate of four cents per share on 35,000 shares under Section 723 of the 1932 Act, *infra* (R. 180), for the reason that the period of the options did not expire until July 31, 1932, that is, subsequent to the effective date of the 1932 Act.

The court below held that an option does not become an "agreement to sell" until the offer is accepted by the exercise of the option; that the statute does not use the word "options"; that Congress would have used it had it intended to tax the grant of options (R. 86); and therefore it allowed recovery of the $1,400 tax paid on this transaction (R. 106–107).

We submit that the options, whether exercised or not, constituted "agreements to sell," as provided by the statute. Section 800, Schedule A–3, Revenue Act of 1926, *infra;* Section 723, Revenue Act of 1932, *infra*. The interpretative regulations define "agreements to sell" to include both "options" and "calls." Article 77 (2) (b), Regulations 71, *infra*.

Apropos of this, we do not think any valid distinction can be made between the principles announced by the Supreme Court in *Treat* v. *White,* 181 U. S. 264, and those involved in the instant case. The court there held a "call" taxable as an

"agreement to sell" stock, under paragraph 1, Schedule A, Section 25, of the Revenue Act of June 13, 1899. It cited examples of "calls" as represented by various instruments, of which the following is typical (pp. 264–265):

EXHIBIT A

NEW YORK, *May 18th, 1899.*

For value received the bearer may call on me on one day's notice, except last day, when notice is not required. One hundred shares of the common stock of the American Sugar Refining Company at one hundred and seventy-five percent at any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, at 3 p. m.

(Signed) S. V. WHITE.

In that case, the tax had been levied on approximately 30,000 shares of stock subject to instruments similar to the one above quoted as "agreements to sell" stock. None of the 30,000 shares had actually ever been "called." The Circuit Court of Appeals for the Second Circuit certified the following question to the Supreme Court (p. 265):

> Is the above memorandum in writing, designated as Exhibit A, an "agreement to sell" under the provisions of Section 25, Schedule A, act of Congress approved June 13, 1898, and, as such, taxable?

The act referred to imposed a tax "on all sales, or agreements to sell, * * *." The Supreme

Court, referring to a "call," adopted the following definition (p. 266):

> It is an agreement, and manifestly an "agreement to sell." It may be referred to as an "offer," or an "option," or a "call," or what not, but it is susceptible of no more exact definition than "an agreement to sell." Inasmuch, therefore, as the statute requires stamps to be affixed "on all sales or agreements to sell," it would seem that these "calls" are within its provisions.

The Court further stated (pp. 266–267):

> * * * "Calls" are not distributed as mere advertisements of what the owner of the property described therein is willing to do. They are sold, and in parting with them the vendor receives what to him is satisfactory consideration. Having parted for value received with that promise, it is a contract binding on him, and such a contract is neither more nor less than an agreement to sell and deliver at the time named the property described in the instrument. It may be a unilateral contract. So are many contracts. On the face of this instrument there is an absolute promise on the part of the promisor and a promise to sell. We cannot doubt the conclusion of the circuit judge that this is in its terms, its essence, and its nature an agreement to sell. Therefore, it comes within the letter of the statute.

It will be observed, therefore, that the Supreme Court defined both calls and options as agreements to sell. This should be conclusive herein.

In the present case, as we interpret the facts, as soon as the resolution of January 27, 1932, was adopted, the taxpayer became absolutely obligated, at the election of the individuals named, at any time up to July 31, 1932, to sell the shares of stock referred to therein. This seems to be true, inasmuch as the options appear to have been given for sufficient consideration. It is apparent, therefore, that these options were taxable as "agreements to sell," as provided by the statute, and that therefore the court below was wrong in holding to the contrary.

It would seem, however, that the options are taxable at the rate of two cents a share, as provided by the Revenue Act of 1932, instead of four cents a share, as provided by the 1934 Act. They are taxable, of course, because they are binding agreements to sell. *Treat* v. *White, supra,* p. 266. It is apparent, therefore, that they became binding agreements to sell on January 27, 1932, prior to the effective date of Section 723 of the Revenue Act of 1932, and that therefore the rate of two cents a share is applicable as provided by Section 800, Schedule A–3 of the Revenue Act of 1926, which was then in force. It would seem to make no difference that the option period did not expire until

after the 1932 provision, referred to, became effective. Accordingly, it was stipulated in the court below that the taxpayer was entitled to at least the sum of $700 thereof (R. 104).

CONCLUSION

It is submitted that the judgment of the court below is erroneous and not in accordance with law. It should therefore be reversed by this Court and judgment entered for the appellant.

Respectfully submitted.

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SEPTEMBER 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—STAMP TAXES

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax (U. S. C., Title 26, Secs. 900, 908).

* * * * *

SCHEDULE A.—STAMP TAXES

* * * * *

3. Capital stock, sales, or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of

profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share. * * *

Revenue Act of 1932, 209, 47 Stat. 169:

SEC. 723. STAMP TAX ON TRANSFER OF STOCKS, ETC.

(a) Subdivision 3 of Schedule A of Title VIII of the Revenue Act of 1926 is amended to read as follows:

"3. Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued), 4 cents,

and where such shares or certificates are without par or face value, the tax shall be 4 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be): * * *." (U. S. C., Title 26, Secs. 902, 921.)

Treasury Regulations 71, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Sales or transfers of stock, either before or after issuance of a certificate, or of rights to subscribe for or to receive such stock, are taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, stock, or to the right to subscribe for or to receive such stock, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

As used in this chapter, the term "sale" or "transfer" includes any of the transactions or dealings in stock, or in rights to subscribe for or to receive stock, which are subject to the tax imposed under Schedule A–3, except where from the context it is clear that a different meaning is intended. As to the use of the term "stock," see article 25.

ART. 32. *Rate of taxation.*—(a) In the case of stock having a par or face value, the amount of the tax is 4 cents on each $100 or faction thereof of the total par or face value of the certificates (or of the shares where no certificates were issued) involved in the sale or transfer, whether such aggregate par or face value is greater or less than $100; e. g., where the total par or face value of the certificate involved in the transaction is $100

or less, the tax is 4 cents; where such value is in excess of $100, the tax is 4 cents on each $100 or fraction thereof.

(b) In the case of shares without par or face value, the tax is 4 cents on the sale or transfer of each share.

(c) However, in the case of a sale of stock, whether with or without par or face value, when the selling price is $20 or more per share, the rate is 5 cents instead of 4 cents.

ART. 33. *Computation of the tax.*—(a) In the case of stock having par or face value, the amount of the tax is computed upon par or face value and not upon the amount that may have been paid in on the stock; e. g., where stock of the par value of $100 is sold or transferred, for which only $25 is paid, the tax is reckoned upon the par value of $100 and not upon the $25 paid.

(b) Where one certificate represents several shares (however large the number of shares) the tax on the sale or transfer of such certificate is computed upon the par or face value of the certificate and not upon the par or face value of each separate share; e. g., on the transfer of 1 certificate representing 500 shares, par value $5, the face value of the certificate being $2,500, the stamp tax is $1. Where shares are not represented by certificates, the tax is computed upon the par or face value of each share.

(c) In the case of stock without par or face value, the tax is computed on each share; e. g., the tax on the sale or transfer of a certificate for 20 shares of such stock is 80 cents.

(d) However, in the case of a sale of stock, whether with or without par or face value, when the selling price is $20 or more

per share, the rate is 5 cents instead of 4 cents; in other respects the tax is computed in the same manner as shown in paragraph (b) or (c).

ART. 34. *Sales and Transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

(d) The transfer of voting trust certificates.

(e) The sale or transfer of temporary or interim certificates of stock.

(f) The sale or transfer of certificates or shares representing beneficial interests in an association. See Article 77 (1) (e)—"Association."

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

(i) The transfer of the right to receive a stock dividend already declared.

(j) The transfer or surrender of stock to a corporation, for the purpose of the corporation, whether or not it intends eventually to sell such stock.

(k) The sale of or agreement to sell shares of stocks made by a broker, directly or indirectly, for himself.

(l) The sale or transfer of stock by a broker at a price different from that at which he accounts to his selling customer.

(m) The transfer of stock in pursuance of a gift, bequest, or conveyance by trustees.

(n) The transfer of stock from parties occupying fiduciary relations to those for whom they hold stock.

(o) The transfer of certificates of stock by an administrator or executor to the legatee or distributee.

(p) The transfer of stock on the books of a domestic corporation, regardless of where the sale is made or the stock certificates delivered.

(q) The sale, transfer, or delivery, within the territorial jurisdiction of the United State, of shares of stock of a foreign corporation.

(r) The transfer of stock of a corporation to be merged to the merging corporation prior to the actual merging and as a condition precedent to the merger.

(s) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation is a transfer by the act of the parties, and not wholly by operation of law.

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

(v) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

(w) Transfer of stock from a firm to individual members thereof upon dissolution of the business.

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ART. 77. *Further definitions.* * * *

(2) As used under Schedule A 2 and 3 of the Revenue Act of 1926:

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(b) The term "agreement to sell" includes options, calls in "puts and calls," offers, indemnities, and priviliges, and contracts, either in writing or by parol, to sell on the deferred or partial payment plan; * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1939